RABECK *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 611. Decided May 27, 1968.

Former § 484–i of the New York Penal Law, which prohibited the sale of "magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes," is unconstitutionally vague and it is no answer to say that it was adopted for the salutary purpose of protecting children.

Reversed.

Stanley Fleishman, Osmond K. Fraenkel, and *Sam Rosenwein* for appellant.

Isidore Dollinger and *Daniel J. Sullivan* for appellee.

PER CURIAM.

Appellant, in seeking reversal of his conviction for selling "girlie" magazines to a minor under 18 years of age in violation of former § 484–i, New York Penal Law,* argues among other grounds that the statute is impermissibly vague. We agree. While we rejected a like claim as to § 484–h in *Ginsberg* v. *New York,* 390 U. S. 629, § 484–i in part prohibited the sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . . ." That standard in our view is unconstitutionally vague. "Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is

*Section 484–i was repealed by N. Y. Laws 1967, c. 791. See *Ginsberg* v. *New York,* 390 U. S. 629, 631–632, n. 1.

not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676, 689.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, would reverse for the reasons stated in his dissenting opinion in *Ginsberg* v. *New York,* 390 U. S. 629, 650.

MR. JUSTICE HARLAN would affirm the judgment of the state court on the premises stated in his separate opinion in *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676, 704. In addition, he considers it a particularly fruitless judicial act to strike down on the score of vagueness a state statute which has already been repealed.